REMARKS

Reconsideration of the Application respectfully is requested. For the reasons indicated in detail below the Application is urged to be in condition for allowance.

As requested by the Examiner, additional information concerning the characteristics that are inherently exhibited by the new 'Chanoud' cultivar has been diligently sought and is provided to the extent available. Such information is provided in the Substitute Specification dated August 21, 2003 that is filed herewith. The botanical classification also has been modified to indicate more current usage. It respectfully is pointed out that those skilled in plant technology will have no difficulty in identifying plants of the 'Chanoud' cultivar in view of Applicant's detailed Specification and photographs. The withdrawal of the rejection under 35 U.S.C. § 112 is urged to be in order and is respectfully requested.

The continued rejection of the claim under 35 U.S.C. §102(b) is urged to be incapable of withstanding detailed analysis for the reasons set forth in detail in Applicant's submission of March 17, 2003. For a plant to enter the public domain one must look to the statutory language as it has existed and been interpreted for over seventy years. There must be public use or sale in the United States for a sufficient time prior the United States filing date in order to create a statutory bar. This has not occurred as indicated in Applicant's submission of March 17, 2003. The Examiner has cited no authority for assertion that the availability an invention outside the United States combined with a non-enabling publication has ever been used to create a statutory bar other than the *Ex parte Thomson* decision. For the reasons indicated in Applicant's submission of March

17, 2003, the controlling authority continues to be the *In re LeGrice* decision that was rendered by the Court of Customs and Patent Appeals. A factual situation directly comparable to that of the present Application was there presented and patentability was found. It respectfully is submitted that there is no sound reason for Patent Office personnel to put forth at this time a different interpretation of the statute from that which has been consistently followed for decades. Such new interpretation is urged to be inappropriate as well as unfair to Applicant.

Plant publications should be disregarded when making a patentability analysis with respect to a new plant variety unless they can be combined with the existing scientific "store of knowledge in the fields of plant heredity and plant eugenics which one skilled in the art will be presumed to possess" so as to enable another to produce the plant. The mere possibility to seek an invention in a foreign country and to bring it to the United States has never been an impediment to patent protection in any area of technology with or without the presence of a nonenabling publication in the absence of a showing that the invention was on sale or in public use in the United States more than one year before the United States filing date. As specified at 35 U.S.C. § 161, Plant Patents and Patents for other inventions should be subject to the same statutory provisions "except as otherwise provided." Title 35 provides no exception capable of supporting a different rule for Plant Patents The statute has been misapplied in the Official Action. Accordingly, the withdrawal of the sole remaining ground of rejection likewise is in order and is respectfully requested.

If any additional information is required please contact the undersigned attorney so that the matter can be discussed and resolved at a personal interview.

Respectfully submitted,

BURNS, DOANE, SWECKER & MATHIS, L.L.P.

Date: August 21, 2003

By: Benton S. Duffett Jr.
Benton S. Duffett, Jr.
Registration No. 22,030

P.O. Box 1404
Alexandria, Virginia 22313-1404
(703) 836-6620